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No. 00-730

IN THE

Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

RODNEY SLATER, SECRETARY OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The Associated General Contractors of America, Inc. ("AGC"), is a nonprofit trade association founded in 1918 to represent and serve the national interests of general construction contractors and other firms associated with the construction industry.[1] AGC has more than 100 state and local

[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the Associated General Contractors of America, Inc., or its members made a monetary contribution to the preparation or submission of the brief.

chapters, with at least one chapter serving the general contractors and related firms in each State, and one chapter in Puerto Rico. AGC's approximately 32,000 regular and associate members engage in the construction of highways, bridges, tunnels, airports, dams and other water conservation projects, water works and waste treatment facilities, and defense facilities.

AGC has long supported open competitive bidding for public construction contracts. That system typically requires interested contractors to submit sealed bids by a specified date and time. It also requires the government agency to open all bids publicly and to award the contract to the lowest responsive and responsible bidder. For these reasons, open competitive bidding typically precludes discrimination based on race or ethnicity, and AGC vigorously opposes any such discrimination. AGC has helped and will continue to help its chapters offer training and other assistance to minority firms.

AGC participated previously in this case by filing amicus curiae briefs in this Court and in the Tenth Circuit. *See Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995); *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147 (10th Cir. 2000) (decision below). AGC argued in these briefs that the federal government's use of the Subcontractor Compensation Clause ("SCC"), which financially rewards general contractors for engaging subcontractors owned by persons of certain races, is subject to, and cannot survive, strict scrutiny. In conflict with decisions of this Court and other courts of appeals, the Tenth Circuit below held otherwise.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a); the requisite consent letters have been filed with the Clerk.

STATEMENT OF THE CASE

Following this Court's decisions and remands in *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), and *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216 (2000), the Tenth Circuit in this case upheld "the constitutionality of the use in federal subcontracting of the Subcontractor Compensation Clause ('SCC'), which employs race-conscious presumptions designed to favor minority enterprises and other 'disadvantaged business enterprises' ('DBEs')." Pet. App. 3.

Although the district court had considered earlier versions of the programs at issue, the Tenth Circuit's primary holding was that "the SCC program and the DBE certification programs *as currently structured* * * * pass constitutional muster." *Id.* at 4 (emphasis added).[2] Observing that "Adarand seeks only prospective declaratory and injunctive relief," *id.* at 10, the court of appeals thought it proper to address the current SCC program because, as the court saw it,

> [t]o ignore intervening changes in the statutory and regulatory framework underlying this litigation would be to shirk our responsibility to strictly scrutinize the real-world legal regime against which Adarand seeks prospective relief. The changes in the law are squarely before us today, and we discern no reason to leave their scrutiny to future litigation, in effect prolonging the instant litigation * * *. [*Id.* at 11.]

Although it upheld the current versions of the SCC and DBE programs, the Tenth Circuit also held that these same programs "as they were structured in 1997, when the district

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[2] The government had advised the court that the SCC is no longer in use in federal highway construction procurement contracts, *see* Pet. App. 12 n.4, 17, 97, but the Tenth Circuit reviewed "the current SCC" (*id.* at 79) because it could not be assured that the government would not resume its use of that program. *See id.* at 10-12.

court last rendered judgment," were *not* narrowly tailored and thus failed strict scrutiny. *Id.* at 4. The Tenth Circuit saw fit to pass on the old regime because, in its words, "[i]t is not fanciful to suggest that the government may retreat to prior practice, but if the government did so, this opinion expressly holds that such an action would be unconstitutional." *Id.* at 12-13.[3]

Adding still to the scope of its decision, the Tenth Circuit indicated that its judgment was meant to resolve the constitutionality of the statutes underlying the SCC program both on their face and on an as-applied basis. *See id.* at 14 ("[W]e * * * address the constitutionality of the relevant statutory provisions *as applied* in the SCC program, as well as their *facial* constitutionality.") (emphasis in original). The broad sweep of the Tenth Circuit's decision was no doubt a reflection of the court's express desire to dispose of this case *in toto*. *See id.* at 18 ("[W]e share wholeheartedly [the] sentiment that the time has come for this litigation to come to an end.").

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[3] Insofar as the Tenth Circuit held unconstitutional the old SCC program for lack of narrow tailoring, it agreed with the district court's holding in *Adarand Constructors, Inc.* v. *Peña*, 965 F. Supp. 1556 (D. Colo. 1997), *vacated*, 169 F.3d 1292 (10th Cir. 1999), *reversed and remanded*, 528 U.S. 216 (2000). Indeed, the Tenth Circuit "emphasize[d] [its] substantial agreement with much of the district court's judgment as it pertains to the versions of the statutes and regulations in place in 1996." Pet. App. 18. (The district court had memorably observed that the program was so poorly tailored that even "the Sultan of Brunei would qualify" for a preference. *Id.* at 191 n.17.). In light of the Tenth Circuit's "substantial agreement" with the district court's judgment, it is unclear why the court did not affirm in part the district court's judgment. Instead, it simply reversed.

SUMMARY OF ARGUMENT

Although this Court held in *Adarand* that the constitutional command of equal protection contained in the Fifth and Fourteenth Amendments requires that "*all* racial classifications, imposed by whatever federal, state, or local governmental actor," Pet. App. 231 (emphasis added), be judged under the exact same test—strict scrutiny—the Tenth Circuit in this case upheld a racially discriminatory federal contracting preference based on evidence that clearly would not have survived strict scrutiny had it been offered in support of a race-based program enacted by a state or locality. This watered-down version of strict scrutiny cannot be reconciled with the strict scrutiny analysis applied by other circuit courts in connection with the review of state and local programs similar to the federal program at issue here. Thus, the critically important question presented in this case is whether strict scrutiny means one thing when applied to the federal government and something else when applied to every other governmental body.

As explained below, the Tenth Circuit's decision conflicts with this Court's decisions in *Adarand* and *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), as well as with the recent decisions of other circuit courts which, unlike the court below, have held race-based contracting preferences unconstitutional. This Court should therefore grant review of the Tenth Circuit's decision. *See Braxton* v. *United States*, 500 U.S. 344, 347 (1991) (a "principal purpose for which we use our certiorari jurisdiction * * * is to resolve conflicts among the United States courts of appeals").

There can be no question about the importance of the constitutional issues raised in this case by the government's decision to classify American citizens according to race. *See* S. Ct. R. 10(a); *see also* Pet. App. 126-127 ("We acknowledge that * * * this case does implicate constitutional issues of substantial importance."). Indeed, this Court has already

granted the writ in this case on two occasions, and the decision below was sufficiently important that it prompted President Clinton to issue a formal written statement in which he applauded the Tenth Circuit for upholding "a major affirmative action program." Statement by the President (Sept. 28, 2000).

ARGUMENT

I. THE TENTH CIRCUIT'S ANALYSIS CONFLICTS WITH THIS COURT'S DECISIONS IN *ADARAND* AND *CROSON*.

The first reason why the writ should be granted is that the Tenth Circuit's decision cannot be squared with this Court's *Adarand* and *Croson* decisions. In *Adarand* this Court held that strict scrutiny applies to federal racial classifications, and in *Croson* this Court demonstrated how such scrutiny is to be performed in the context of a race-based contracting preference. The scrutiny applied here by the Tenth Circuit was, however, far less strict than that applied by this Court in *Croson*. Thus, the decision below cannot be reconciled with both *Adarand* and *Croson*: If the scrutiny the Tenth Circuit applied was not intended to be strict, the court violated the central command of *Adarand*. And if the court did intend to apply strict scrutiny, it failed, in fact, to do so and thus violated *Croson*.

In *Adarand*, this Court held that there is a unitary standard of review for all racial classifications—no matter what body or level of government imposes the classification. *See* Pet. App. 227 ("any person, of whatever race, has the right to demand that *any* governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny") (emphasis added). The exact same test applied to a state or local government's racial classification must also be applied to "congressional racial classifications." *Id.* at 233. Thus, as Justice Stevens correctly recognized in his dissent, under

Adarand "there is no significant difference between a decision by the Congress of the United States to adopt an affirmative-action program and such a decision by a State or municipality." *Id.* at 258.

After holding in *Adarand* that strict scrutiny must be applied to the SCC and DBE programs at issue here, this Court "remand[ed] the case to the lower courts for further consideration in light of the principles we have announced" without deciding whether these programs could withstand such scrutiny. *Id.* at 243. The Court thus did not perform the strict scrutiny analysis that it held was required. *Cf. id.* at 246 (Scalia, J., concurring) ("It is unlikely, if not impossible, that the challenged program would survive under [my] understanding of strict scrutiny").

Nevertheless, prior to *Adarand*, this Court in *Croson* had analyzed under strict scrutiny a minority set-aside program enacted by the City of Richmond and had held the program unconstitutional under that test. Accordingly, if *Adarand* means anything, it means that the federal government's SCC and DBE programs must be subjected to the same rigorous scrutiny applied in *Croson*. Strict scrutiny cannot mean one thing when applied to the federal government and something else when applied to every other unit of government.[4] As

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[4] In no area of constitutional law of which we are aware does the same test mean something different when applied to the federal government than when applied to a state or locality. The flag burning cases are an example. In *Texas* v. *Johnson*, 491 U.S. 397 (1989), this Court subjected Texas' flag desecration statute, a content-based speech restriction, to " 'the most exacting scrutiny' " under the First Amendment, *id.* at 412 (quoting *Boos* v. *Barry*, 485 U.S. 312, 321 (1988))—which means, just as it does in the equal protection context, that a speech restriction must be narrowly tailored to serve a compelling governmental interest, *see Boos*, 485 U.S. at 321. One year after *Johnson*, the Court in *United States* v. *Eichman*, 496 U.S. 310 (1990), applied the exact same analysis to the *federal* Flag Protection Act of 1989. *See id.* at 314-315. And

shown below, however, the analysis applied by the Tenth Circuit in this case was far less strict than the analysis applied in *Croson*.[5] More than anything else, the Tenth Circuit's analysis resembles the deferential analysis applied in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980)—which *Adarand* rejected. *See* Pet. App. 241 (insofar as "*Fullilove* held federal racial classifications to be subject to a less rigorous standard [than strict scrutiny], it is no longer controlling").

To satisfy strict scrutiny, "[f]ederal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Id.* at 240-241. The compelling interest offered by the government in support of the SCC and DBE programs, and accepted by the Tenth Circuit, was the interest in remedying the effects of past and present discrimination against minority contractors. *See id.* at 24-27. Thus, as the Tenth Circuit correctly recognized, *Croson* required the government to come forward with "a strong basis in evidence" to support its conclusion that remedial action is necessary. *Id.* at 29 (citing *Croson*, 488 U.S. at 500).

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neither the Court nor the *Eichman* dissenters suggested that the scrutiny should be any less exacting simply because it was enacted by Congress. On the contrary, so clear was it that the same analysis would apply to the federal statute that "[t]he only remaining question [was] whether the Flag Protection Act is sufficiently different from the Texas statute." *Id.* at 315.

[5] The scrutiny applied by the Tenth Circuit was also—by its own admission—less strict than that applied by the district court in this case. Responding to the district court's statement that it is "difficult to envisage a race-based classification that is narrowly tailored," Pet. App. 189, the Tenth Circuit stated that the district court had "effectively pronounc[ed] strict scrutiny fatal in fact," *id.* at 7, and that "we disagree with the district court's effectively fatal standard of scrutiny," *id.* at 78.

Based on the government's showing, the Tenth Circuit made the sweeping pronouncement that "the construction contracting market is overwhelmingly composed of non-minorities due to the effects of racial discrimination." *Id.* at 53 n.18.[6] The Tenth Circuit held that the government has a compelling interest in conferring on minority contractors preferences unavailable to non-minorities—no matter how "personally innocent" the non-minorities disadvantaged by the preferences are. *Id.* at 52.

The Tenth Circuit said that the requisite strong basis in evidence was to be found "particularly" (*id.* at 54) in a document printed in the Federal Register. *See id.* at 31 (citing Appendix—The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey, 61 Fed. Reg. 26,050 (1996)). The Appendix, which was prepared by the Justice Department in the wake of *Adarand*—and with an eye toward the litigation to follow from this Court's 1995 remand—purports "to summarize the evidence that has been assembled to date on the compelling interest question" and "the legislative record that underpins the acts of Congress that authorize affirmative action measures in procurement." 61 Fed. Reg. 26,050. *See* Pet. App. 31 (the Appendix "cit[es] approximately thirty congressional hearings since 1980 concerning minority-owned businesses"). In the Tenth Circuit's view, the Appendix was

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[6] Some of the allegedly discriminatory barriers facing minorities cited by the Tenth Circuit are actually race-neutral, such as "old boy networks," the "lack of familial connections," the fact that few minorities "have families from whom they can inherit a construction business," and the difficulties encountered by "new entrants" in the market. Pet. App. 34, 35, 39. At certain points in its opinion, the Tenth Circuit seemed to lose sight of the relevance for present purposes of the distinction between racial discrimination and other problems faced by minority contractors. *See id.* at 40 (referring to "the insularity and *sometimes outright racism* of non-minority firms in the construction industry") (emphasis added).

evidence of a congressional "finding" (*id.*) that historical and present discrimination by various private actors (specifically, prime contractors, unions, lenders, customers, business networks, suppliers, and bonding companies) has impeded both the formation of minority subcontracting businesses and the ability of such businesses once formed to compete for subcontracts. *See id.* at 33-44.

The Tenth Circuit also drew upon the so-called "disparity studies" cited in the Appendix. *Id.* at 44. Commissioned by certain state and local governments, these studies claim to find a statistically significant disparity between the availability of minority-owned business for construction work and the actual utilization of such businesses. *See id.* at 44-48.[7] The Tenth Circuit concluded that this evidence "raise[d] an inference that the various discriminatory factors the government cites have created that disparity," *id.* at 46, even though "[t]he government's review of those studies reveals that * * * such disparity was *least* glaring in the category of construction subcontracting." *Id.* at 45 (emphasis added).

Under *Croson*, the congressional materials and disparity studies discussed in the Appendix and relied upon by the Tenth Circuit are plainly insufficient to establish a strong basis in evidence for the government's contention that a racially discriminatory federal contracting preference is needed to combat present discrimination in the construction industry or the lingering effects of historical discrimination against minority contractors.

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[7] In *Croson*, a plurality of the Court indicated that "[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." 488 U.S. at 509 (opinion of O'Connor, J.).

With respect to the Tenth Circuit's reliance upon Congress' "finding" of discrimination in the construction industry, the congressional materials cited in the Appendix are far too general to establish a compelling interest in a nation-wide program applicable to virtually all racial minorities in every type of construction business. That is, Congress has not made findings with respect to specific geographic areas in which discrimination is a problem, the specific racial groups against which discrimination has been perpetrated, or the specific sectors of the construction industry pervaded by discrimination.[8]

The lack of such particularized findings is fatal under *Croson*. There, like the government and the Tenth Circuit here, "the city and the District Court relied on Congress' finding * * * that there had been nationwide discrimination in the construction industry," but this Court held that "[t]he probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited," adding that "[i]f all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity." *Croson*, 488 U.S. at 504. *See also id.* at 498 ("[A] generalized assertion that there has been past discrimination in an entire industry

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[8] It is important to recognize that there is not a single, nationwide market for most government contracts. Although the rare contract for a new fighter-bomber would attract national attention and bidders regardless of location, a contract for a guardrail in Colorado surely would not. Indeed, when it established benchmarks and price evaluation adjustments for use in federal procurements, the Department of Commerce considered the construction industry on a region-by-region basis rather than on the national basis on which other industries were evaluated. Small Disadvantaged Business Procurement; Reform of Affirmative Action in Federal Procurement, 63 Fed. Reg. 35,714 (1998).

provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.").[9]

If a congressional finding of discrimination can provide the strong basis in evidence necessary to justify a racially discrimination contracting preference, such a finding must be far more detailed and specific than any finding Congress has made to date. *See* Pet. App. 232-233 (" '*Unless Congress clearly articulates the need and basis* for a racial classification, *and also tailors the classification to its justification*, the Court should not uphold this kind of statute.' ") (quoting *Fullilove*, 448 U.S. at 545 (Stevens, J., dissenting)) (emphasis added by the *Adarand* Court).

The disparity studies cited by the government and relied upon by the Tenth Circuit are also insufficient to establish the requisite strong basis in evidence needed to support a national racial contracting preference. Assuming that each and every such study performed to date is methodologically sound and probative of discrimination—a *highly* questionable assumption at best[10]—these studies would not support

[9] Owing to the lack of evidence of discrimination in the mountain states, the Department of Commerce has not authorized a price evaluation adjustment for small disadvantaged business in the construction industry in that area. *See* 63 Fed. Reg. at 35,714.

[10] In fact, none of the disparity studies cited by the government and the Tenth Circuit has undergone and survived final (as opposed to interlocutory) judicial scrutiny. In recent years, a number of race-based contracting preferences in such places as Columbus, Dade County, Houston, and Philadelphia have been struck down despite the disparity studies offered in support of them. Conversely, *not one* federal appellate court has accepted a disparity study as valid on a fully developed factual record. *See* George R. La Noue, *Who Counts?: Determining the Availability of Minority Businesses for Public Contracting after* Croson, 21 Harv. J.L. & Pub. Pol'y 793, 797 (1998) (noting that "many of these studies do not meet standards established by federal courts").

the enactment of a national program because a *national* disparity study has never been conducted. Rather, all of the studies were performed at the "state and local" level. Pet. App. 44. Of course, such limited evidence cannot justify the implementation of a racially discriminatory contracting preference on a national scale. As this Court said in *Croson*, "[w]e have never approved the extrapolation of discrimination in one jurisdiction from the experience of another." 488 U.S. at 505.

The Tenth Circuit defended its departure from a strict *Croson* analysis based in part on Section 5 of the Fourteenth Amendment. Although the court "declin[ed] to address the precise relationship between § 5 of the Fourteenth Amendment and the power of Congress, acting through the Executive branch, to address racial discrimination by the states," Pet. App. 25-26, the court opined that Section 5 "grants Congress broad remedial powers in the area of discrimination," *id.* at 27—broader than the powers of states and localities. *See id.* at 77 n.25 ("[T]he geographic scope of the remedial powers of a local government, as in *Croson*, and that of Congress's remedial powers under § 5 of the Fourteenth Amendment differ.").

The Tenth Circuit did not explain, however, how its view of Section 5 can be reconciled with this Court's cases (not cited by the court below) holding that Section 5 authorizes Congress to redress only discriminatory action *by the states*, not by private individuals. *See United States* v. *Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 1755-56 (2000) ("[T]he language and purpose of the Fourteenth Amendment place certain limitations on the manner in which Congress may attack discriminatory conduct. * * * Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action."). In *Morrison* the Court recalled that in the *Civil Rights Cases*, 109 U.S. 3 (1883), "we held that the public accommodation provisions of the Civil Rights Act of 1875, which applied to

purely private conduct, were beyond the scope of the § 5 enforcement power." *Morrison*, 120 S. Ct. at 1756. *See also City of Boerne* v. *Flores*, 521 U.S. 507, 524-525 (1997); *Romer* v. *Evans*, 517 U.S. 620, 628 (1996) ("it was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodation"). *Cf.* Pet. App. 234-235 (not addressing the Section 5 issue).

Drawing on the Appendix, the Tenth Circuit found evidence that minority contractors have been discriminated against by *private actors* in the construction industry; but it cited no evidence whatsoever that states or state officials have engaged in discriminatory conduct. Furthermore, like the federal statute at issue in *Morrison* found to be outside of the scope of Congress' Section 5 power, the SCC "is directed not at any State or state actor" and it "visits no consequences whatever on any [state] public official." *Morrison*, 120 S. Ct. at 1758.[11] Accordingly, Section 5 cannot be raised in defense of the SCC. *Cf. Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 605-606 (1990) (O'Connor, J., dissenting) ("Section 5 empowers Congress to act respecting the States, and of course this case concerns only the administration of federal programs by federal officials.").

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH OTHER FEDERAL COURT OF APPEALS DECISIONS.

The Tenth Circuit's decision conflicts not only with *Adarand* and *Croson* but also with the post-*Adarand* decisions of other federal circuit courts holding unconstitutional race-based contracting preferences enacted by states and subdivi-

[11] The Court in *Morrison* also deemed the federal statute at issue there beyond the Section 5 power because the statute "applie[d] uniformly throughout the Nation" and was not "directed only to those States in which Congress found that there had been discrimination." 120 S. Ct. at 1759. This analysis also applies here.

sions thereof. *See Associated Gen. Contractors of Ohio, Inc.* v. *Drabik*, 214 F.3d 730 (6th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3419 (U.S. Dec. 14, 2000) (No. 00-976); *W.H. Scott Constr. Co.* v. *City of Jackson*, 199 F.3d 206 (5th Cir. 1999); *Engineering Contractors Ass'n of S. Fla., Inc.* v. *Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998); *Contractors Ass'n of E. Pa., Inc.* v. *City of Philadelphia*, 91 F.3d 586 (3d Cir. 1996), *cert. denied*, 519 U.S. 1113 (1997). Indeed, the Tenth Circuit itself acknowledged that some of these very cases could be read to conflict with its decision and stated that, if so, "we reject their holdings." Pet. App. 48 n.14.

In *Drabik*, the Sixth Circuit held that Ohio's Minority Business Enterprise Act was not supported by a compelling interest. Although Ohio offered statistical evidence of racial discrimination against minority contractors that the court viewed as "stronger * * * than the statistics in *Croson*," the Sixth Circuit held that Ohio's proof was "still insufficient." 214 F.3d at 736. As the Sixth Circuit explained:

> The deficiencies of the data are glaringly clear. Much of it is severely limited in scope (ODOT contracts) or is irrelevant to this case (ODOT purchasing contracts). As noted previously, the data does not distinguish minority construction contractors from minority businesses generally, and *a fortiori* makes no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size. And * * * Ohio * * * concedes that "AGC showed that the State had not performed a recent study." [*Id.*]

The Sixth Circuit also held that

> The only cases found to present the necessary "compelling interest" sufficient to "justif[y] a narrowly tailored race-based remedy" are those that expose, as in the case of the Alabama Department of Public Safety in 1987,

> "pervasive, systematic, and obstinate discriminatory conduct," *Adarand*, 515 U.S. at 237 (citing *United States* v. *Paradise*, 480 U.S. 149 (1987)). Ohio has made no such showing. [214 F.3d at 737.]

In *W.H. Scott Construction Co.* the Fifth Circuit rejected the disparity study commissioned by the City of Jackson, Mississippi, and offered in support of the City's DBE program. The court explained that

> Had the City adopted particularized findings of discrimination within its various agencies, and set participation goals for each accordingly, our outcome today might be different. Absent such evidence in the City's construction industry, however, the City lacks the factual predicates required under the Equal Protection Clause to support [its] 15% DBE-participation goal. [199 F.3d at 219.]

It is evident that the Fifth Circuit in *W.H. Scott Construction Co.* and the Sixth Circuit in *Drabik* demanded far more specific evidence and findings than did the Tenth Circuit in this case, and that the evidence offered by the government here clearly would not have passed muster under the strict scrutiny analysis of those two circuits. Nor was the statistical evidence accepted by the Tenth Circuit subjected to anything close to the kind of careful scrutiny applied by the Eleventh Circuit to the data before it in *Engineering Contractors Association of South Florida, Inc., supra*. *See* 122 F.3d at 912-924.[12] Plainly, the Tenth Circuit has set the bar far lower than has the Fifth, Sixth, and Eleventh Circuits.[13]

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[12] In affirming the district court's conclusion that Dade County's statistical data "was insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference," 122 F.3d at 924, the Eleventh Circuit agreed with the plaintiffs that "the disparities illustrated by the County's statistical analysis * * * are better explained by firm size than by discrimination. The plaintiffs point out that minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts." *Id.* at 916.

[13] The decision below conflicts with *Drabik* in still another respect. The court below considered "[p]ost-enactment evidence"—*i.e.*, evidence found or created after the enactment of the program under review—stating that such evidence was "particularly relevant" in this case. Pet. App. 30 n.11. *See also Concrete Works of Colo., Inc.* v. *Denver*, 36 F.3d 1513, 1529 n.23 (10th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995). *Drabik*, however, rejected the relevance of post-enactment evidence. *See* 214 F.3d at 738 ("[U]nder *Croson*, the state must have had sufficient evidentiary justification for a racially conscious statute *in advance of its passage*; the time of a challenge to the statute, at trial, is not the time for the state to undertake factfinding.") (emphasis added).

The decision below also conflicts with the leading Third Circuit case. In *Contractors Association of Eastern Pennsylvania, Inc.*, the Third Circuit held that "a court cannot conduct the strict scrutiny review required by *Croson* without first identifying with specificity the discrimination allegedly giving rise to the compelling state interest." 91 F.3d at 599. The court noted that "in the course of this litigation, * * * several distinct forms of racial discrimination have been advanced," namely (1) "discrimination by prime contractors in the awarding of subcontracts," (2) "discrimination by contractors associations in admitting members," and (3) "discrimination by the City in the awarding of prime contracts." *Id.* The Third Circuit thus held that "[s]ince these three forms of discrimination involve discrimination by different decisionmakers in different markets, *we must independently determine whether there is a strong basis in the evidence for believing that each particular form of discrimination existed.*" *Id.* (emphasis added). The Third Circuit then closely examined the statistical evidence in support of each alleged form of discrimination. *See id.* at 599-605. In sharp contrast, the Tenth Circuit did nothing of the sort in this case.

The Tenth Circuit's narrow tailoring analysis also conflicts with *Drabik*, in which the Sixth Circuit held that the Ohio statute at issue

> suffers from defects both of over and underinclusiveness. By lumping together the groups of Blacks, Native Americans, Hispanics, and Orientals (and leaving unclear the exact extent of the last two designations), the [Ohio statute] may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven. Thus, the [Ohio statute] is satisfied if contractors of, let us say, Thai origin, who might never have been seen in Ohio until recently, receive 10% of state contracts, while African-Americans receive none. [214 F.3d at 737.]

The exact same charges could be leveled against the SCC program, but the Tenth Circuit did not do so. Evidently, the tailoring demanded by strict scrutiny need not be as narrow in the Tenth Circuit as it must be in the Sixth.

Finally, the decision below conflicts with the D.C. Circuit's decision holding unconstitutional a race-based *federal* program. *See Lutheran Church-Missouri Synod* v. *FCC*, 141 F.3d 344 (D.C. Cir. 1998), *further opinion on rehearing*, 154 F.3d 487 (D.C. Cir. 1998).

As this Court and the Tenth Circuit have observed, the Small Business Act establishes a "Government-wide goal for participation" by minority contractors in "not less than 5 percent of the total value of all prime contract and subcontract awards for each year." 15 U.S.C. § 644(g)(1). *See* Pet. App. 205, 15. Meanwhile, the statutes authorizing the relevant appropriations—known by the acronyms STURAA, ISTEA, and TEA-21—set a 10% goal. *See id.* at 16. The district court held these goals unconstitutional, *see id.* at 198 ("I find the statutory sections containing these goals insufficiently narrowly tailored"), but the Tenth Circuit reversed on this point, holding that "the 5% and 10% goals incorporated

in the statutes at issue here, unlike the set-asides in both *Fullilove* and *Croson*, are *merely aspirational and not mandatory*. Therefore, while the goal may well be relevant to the * * * strict scrutiny inquiry, we disagree with the district court that the goal itself is unconstitutional." *Id.* at 66 (citation omitted) (emphasis added).

This holding directly conflicts with the D.C. Circuit's decision in *Lutheran Church-Missouri Synod*, which held unconstitutional "aspirational and not mandatory" federal minority hiring goals. In that case the D.C. Circuit applied *Adarand* to FCC affirmative action regulations establishing as a goal for radio station license holders that they hire minority and female employees in relation to their availability in the area labor force. *See* 141 F.3d at 351-352 (the FCC regulations are "built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional representation"). In defense of the regulations, the FCC and the Justice Department argued that the "regulations stop short of establishing preferences, quotas, or set-asides." *Id.* at 351. The D.C. Circuit, however, held that it was irrelevant whether the regulations imposed a quota or merely a goal. The court explained that

> we do not think it matters whether a government hiring program imposes hard quotas, soft quotas, or goals. Any one of these techniques induces an employer to hire with an eye toward meeting the numerical target. As such, they can and surely will result in individuals being granted a preference because of their race. [*Id.* at 354.]

See also MD/DC/DE Broadcasters Ass'n v. *FCC*, No. 00-1094, 2001 WL 32786 (D.C. Cir. Jan. 16, 2001) (applying strict scrutiny and finding unconstitutional FCC rule mandating recruitment targeted at minorities).

The Fifth Circuit agrees with the D.C. Circuit on this issue. *See W.H. Scott Constr. Co.*, 199 F.3d at 215 ("We agree with the district court * * * that it is irrelevant whether [a racial

classification] establishes 'goals' or 'quotas' for DBE participation. As the D.C. Circuit noted [in *Lutheran Church-Missouri Synod*], the distinction is immaterial"). *See also Monterey Mech. Co.* v. *Wilson*, 125 F.3d 702, 712 (9th Cir. 1997) ("there is no de minimis exception to the Equal Protection Clause"). The Court should grant the writ to resolve this conflict and the other conflicts described above.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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